

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

ALBA SERVICES, INC.

and

Case 02-CA-271714

**CONSTRUCTION & GENERAL
BUILDING LABORERS LOCAL 79**

*Matthew S. Murtagh, Esq. and Jacob Frisch, Esq.,
for the General Counsel.*

*David Benjamin Friedrich, Esq.,
for the Respondent.*

*Haluk Savci, Esq.,
for the Charging Party Union.*

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. The Respondent is a nonunion contractor that performed demolition services at 40 West 29th Street, New York, NY (the Site) in December 2020 and January 2021.¹ During this period, the Charging Party Union (the Union or Local 79) maintained a job action at the Site. The instant case concerns events which occurred at the Site on January 14.

The Union filed the charge on January 20 and the first amended charge on May 10. The complaint issued on July 27 and the Respondent filed an answer to the complaint on August 9. The hearing was tried before me by Zoom teleconference on November 1, 3, 4 and 5.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Fausto Chafila because he engaged in union activities. The complaint further alleges that the Respondent, by supervisor Richard Mosslih, violated Section 8(a)(1) of the Act by instructing a Union representative not to speak with its employees, interrogating employees regarding their union activities, and interrogating employees regarding the identity of an employee who passed certain documents to a union representative.

As discussed below, I find that the Respondent unlawfully (1) discharged Chafila, (2) directed a union representative not to speak with its employees, and (3) interrogated Chafila regarding his union activities. I do not find that the Respondent unlawfully interrogated other employees regarding the identity of the employee who passed certain papers to the Union.

¹ All dates herein refer to 2021 unless stated otherwise.

FINDINGS OF FACT²

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JURISDICTION

The Respondent admits, and I find, the following with respect to commerce: At all material times, the Respondent has been a New York corporation with an office and place of business located at 240 West 52nd Street, 4th Floor, New York, NY 10019. The Respondent is engaged in the construction industry and provides demolition and excavation services.

10 Annually, in conducting its business operations, the Respondent provides services valued in excess of \$50,000 directly to customers located outside the State of New York. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 Based on the foregoing, I find that this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES20 **Prior to January 14**

Mosslih was the Respondent's supervisor in charge of the Site. In that capacity, he was responsible for directing and overseeing about 20-25 employees who worked on the project each day. (Tr. 36, 450) (R. Exh. 9) Mosslih has used the same crew for different construction companies over the past 10 years and is responsible for all hiring, firing, and discipline of employees.³ (Tr. 344-347) Mosslih does not speak Spanish. According to Mosslih, his employees only speak Spanish and do not speak English. (Tr. 349) Therefore, Mosslih communicates with them through his foreman and interpreter, Murcio Guzman. (Tr. 31-33, 371, 487) According to Mosslih, "[Guzman] runs the job. I tell him what has to be done, what I need done, and he translates it to all the men." (Tr. 371). Neither Mosslih nor Guzman perform the

² The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent evidence of a fact is trustworthy and not contested, the fact is generally stated without reference to the underlying evidence. To the extent testimony contradicts the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was otherwise unworthy of belief. In assessing credibility, I rely upon witness demeanor. I also consider the context of witness' testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions and witnesses may be credited in part. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd. on other grounds* 340 U.S. 474 (1951)).

³ Over the years, Chafra occasionally left Mosslih's crew, went to work for another employer, and returned to Mosslih's crew. (Tr. 344-345, 347-350)

same demolition work as rank-and-file employees.⁴ (Tr. 115-116)

Before Mosslih became a supervisor, he worked as a laborer for 15 years. Mosslih joined Local 79 in 1998 and is still a member. Mosslih has never been a supervisor of a union represented crew. (Tr. 343-344, 450)

Chafra was employed by the Respondent to perform demolition work from 2017 to January 14. (Tr. 27) Chafra also worked on Mosslih's crew with previous employers for several years. Mosslih admittedly considered Chafra a good, hard-working employee who was always on time and reliable. (Tr. 350) In Chafra's most recent evaluation, Mosslih rated Chafra "Excellent" in all categories with the exception of "Good" in "Paperwork/Reports." (G.C. Exh. 41) Mosslih testified that he considered Chafra family and loved him like a brother. (Tr. 349, 454)

Ryhem Brown is a driver employed by Alba Carting and Demolition. Brown is not employed by the Respondent. In December 2020 and January, Brown was responsible for hauling demolition debris from the Site. (Tr. 300-303)

The Site was a six-floor commercial building on the south side of 29th Street. The lobby of the building was a large open space. In the lobby, Mosslih maintained a table with drawers as a makeshift office for paperwork. Mosslih kept stacks of blank documents on the table, including employee sign-in forms (called Foreman Sheets) and COVID-19 Daily Employee Health Log forms. (G.C. Exh. 3-4) Employees were required to sign the Foreman Sheet and complete a COVID form each day. (Tr. 371-375, 418-423) The COVID forms were written in English and sought yes or no answers to the following questions (G.C. Exh. 3):

1. Have you shown any of the following symptoms in the past 14 days[?]
 - Fever (temperature above 100.4° F)
 - Cough
 - Shortness of breath/ difficulty breathing
2. Have you been turned away from a job site in the past 14 days due to COVID symptoms?
3. Have you been in close contact with someone with a suspected/confirmed case in the last 14 days?
4. Have you returned from any foreign/domestic travel in the past 14 days?
5. Have you been advised to self-isolate or quarantine in the past 14 days?

The COVID forms also indicated that "[a]ll employees must hold themselves accountable for their current health condition and how the [sic] interact (social distancing – 6ft) with others to help prevent the spread of COVID-19. All workers must understand the symptoms of COVID-19 (refer to information posters provided onsite.)" (G.C. Exh. 3)

It was Mosslih's understanding that the law required employers to have employees complete the COVID form each day and that the completed forms were subject to inspection by the New York City Department of Buildings (DOB). Mosslih also believed the law required employers to take the temperature of each employee who entered the Site. (Tr. 418-423, 474)

According to Mosslih, "important documents were kept in binders," but blank COVID

⁴ The Respondent has denied that Mosslih was a supervisor within the meaning of Section 2(11) of the Act and that Mosslih or Guzman were agents within the meaning of Section 2(13) of the Act.

forms were not. (Tr. 420) Blank COVID forms were generally kept on the table in stacks. Mosslih had hundreds of blank COVID forms copied when he began to run out of them. (Tr. 418-423, 427, 429-430, 440)

5 At the beginning of each day, employees went through a screening procedure before entering the building and starting work. Employees generally arrived before 6:40 a.m. and lined up on the sidewalk adjacent to the door of the Site. Mosslih unlocked the door upon his arrival. Guzman took blank COVID forms from the table and handed them out to employees. Employees usually filled out the forms while standing on line and then entered the building.
10 Guzman took each employee's temperature and collected their completed COVID forms. Each employee signed the Foreman Sheet and wrote 7 a.m. to indicate their start times for payroll purposes. Mosslih scanned each employee's OSHA card. Mosslih told Guzman what he wanted done for the day and Guzman told employees where to go and what to do. The employees changed for work in the lobby. At 7 a.m., employees reported to their workstations.
15 Although employees were expected to report to their workstations at 7 a.m., they were allowed a 15-minute grace period after 7 a.m. and would not be disciplined for reporting to work in that period. (Tr. 33-36, 110-111, 116, 120-123, 360-366, 371, 426-427, 490-495)

Once Guzman collected all the completed COVID forms, he would give them to Mosslih.
20 Mosslih placed the completed COVID forms in an envelope and stored the envelope in a drawer. Mosslih did not always immediately put the completed COVID forms in the envelope if work was particularly busy that day. Mosslih believed the law required him to store completed forms in this manner. (Tr. 418-423)

25 Every afternoon, Mosslih completed an electronic form called a Raken Report. The daily Raken Report has a section for Mosslih to enter general notes and describe accidents/incidents which occurred on the job that day. (Tr. 382-386)

The Union maintained a job action at the Site while the Respondent was working on the
30 project. Mosslih testified that the Union had signs alleging that his employees were being exploited and paid unfairly. Mosslih and Guzman testified that Union representatives routinely spoke to employees in front of the Site about going to work for a unionized employer. (Tr. 350-353, 476-477, 489, 514-515) Mosslih and Guzman also testified that Mosslih has never told employees not to speak with union representatives or vice-versa. (Tr. 399-400, 491-492)
35 However, former employee Richard Garcia testified that Mosslih would become upset when he saw the Union in front of the Site and sometimes, either himself or through Guzman, told employees they could not speak to the Union. According to Garcia, "they try to threaten us that we should not get into the Union because they don't have too many jobs. And that we will be . .
40 . without work [for] several days a week." (Tr. 140-143)

On January 13, Sebastian Zarnoch, an organizer employed by the Laborers Eastern Region Organizing Fund (LEROF),⁵ established a Union "rat action" in front of the Site. A rat action involves the erection of an inflatable rat in front of a construction project. Zarnoch attempted to speak with some of the Respondent's employees when they arrived for work, but

⁵ LEROF is associated with the Laborers International Union of North America and performs organizing for laborer locals in certain regions. (Tr. 159)

was unable to do so because the employees spoke Spanish and he did not. (Tr. 159-161)

January 14

5 On January 14, at about 5:30 and 5:45 a.m., respectively, Zarnoch and fellow Union organizer Diego Ayala came to the Site for another rat action. Zarnoch erected an inflatable rat on his pickup truck in the lane across the street from the Site. Ayala attended because he speaks Spanish and Zarnoch was unable to communicate with employees the previous day. Ayala wore a Union jacket. About 10 retired Union members also took part in the job action. (Tr. 159-164, 267)

15 Chafla arrived for work at 6:26 a.m. and stood on line behind several employees. Ayala approached the employees and began talking about the Union. Guzman was present to hand out COVID forms. Chafla asked Ayala what he needed to get into the Union. Ayala answered that it only required "winning of the people[.]" (Tr. 39) Ayala asked Chafla for his phone number and Chafla stated his phone number orally. Ayala attempted to type Chafla's number directly into his phone, but did not immediately save the number or call Chafla. Before Ayala could call Chafla, someone said, "There comes Richie, the supervisor." Chafla was the only employee of the Respondent who spoke to Ayala that morning. Zarnoch took a picture of Ayala standing in front of Chafla and three other employees. The picture is date/time stamped January 14 at 6:31 a.m. (Tr. 37-40, 95, 126-127, 266-267, 285) (G.C. Exh. 11)

25 Ayala testified that Mosslih walked by him as he was speaking to Chafla and seemed to notice his Union jacket. According to Ayala, Mosslih became upset and said, "Don't talk to my fucking people." (Tr. 268-268) Chafla initially testified that Mosslih said, "you fucking guys . . . should not talk with the people." Upon further reflection, Chafla recalled that Mosslih used the term "his people" or "my guys."⁶ (Tr. 43-44) Zarnoch testified that Mosslih yelled, "stop talking to my fucking people," and told his workers, "stop talking to them." (Tr. 173-174) (G.C. Exh. 13-14) Guzman testified that he did not hear Mosslih tell any Union representative during the altercation that they could not communicate with his employees. (Tr. 491-492) Mosslih denied he told Union representatives not to speak to his employees or vice-versa. (Tr. 399-400) According to Mosslih, there was "one individual from the Union standing in our lane."⁷ Mosslih testified that this person (i.e., Ayala) called him a "motherfucker, a piece of shit" and accused him of "robbing the workers." (Tr. 367-370) However, in an affidavit provided during the investigation of this matter, Mosslih stated, "[w]hen I arrived, I did not approach or speak to any of the Union representatives, nor did they speak to me. Upon my arrival at the building [I] immediately entered the building." (Tr. 435)

40 Zarnoch testified that he began using his cellular phone to record Mosslih from across the street after Mosslih began arguing with Ayala. The video was entered into evidence and reflects an altercation between Mosslih and individuals engaged in the Union job action. (G.C. Exh. 13-14) The video initially shows Mosslih walking toward Ayala and saying something largely unintelligible. After about 30 seconds, Mosslih can be heard telling Ayala three times to "do something." During this altercation, Zarnoch said, "shame on you" and accused Mosslih of

⁶ Chafla largely testified in Spanish with an interpreter, but testified in English regarding this statement by Mosslih.

⁷ Mosslih testified that the Respondent had permits which reserved certain lanes in front of the job site for its trucks. However, the permits in question were only valid for the period January 22 to April 3 (not January 14). Ayala was on foot and the evidence does not indicate he obstructed any vehicle from parking. (Tr. 353-359)

exploiting workers. Mosslih can be heard telling the Union that his employees "make more than you" and "you don't work." There was cursing by individuals on both sides of the argument, which lasted over 4 minutes. Mosslih ultimately opened the door to the Site and entered the building. Ayala crossed the street to join Zarnoch. (Tr. 46, 183, 269)

At 6:42 a.m., Ayala attempted to call Chafra, but had the wrong number and a woman answered. As reflected in an electronic phone record, Ayala incorrectly entered in his phone the seventh digit of Chafra's phone number. (G.C. Exh. 25) Ayala yelled to Chafra across the street that he needed his phone number again because the one he had was wrong. Ayala testified that Chafra said he would provide the number. Chafra testified that he did not answer, but took a piece of paper from his bag and wrote his name and phone number on it. In writing his phone number, Chafra made a small scratch in the second digit, but the number was still legible. According to Chafra, he threw this piece of paper in the street and Zarnoch walked over to pick it up. (G.C. Exh. 17-18) However, neither Zarnoch nor Ayala testified that Chafra threw a piece of paper in the street at this time. (Tr. 46-51, 253-255, 269-272)

At about 6:45 or 6:50 a.m., Chafra entered the Site, signed the Foreman Sheet, and gave Guzman a completed COVID form. Chafra approached Garcia, who was changing for work about 15 meters from Mosslih's desk. Mosslih was sitting at the table scanning employee OSHA cards and Guzman was standing by his side. Chafra approached Garcia and asked if he had a piece of paper. Garcia said he did not have any paper. According to Garcia, Chafra came and left very fast. Chafra exited the building. Chafra testified that, after asking Garcia for paper, he looked and found another piece of paper in his bag. Chafra rewrote his name and number on this second piece of paper because he was concerned that Ayala would not be able to read the number on the first piece of paper (which had a scratch in one of the digits). (Tr. 51-57, 82-86, 130-134) (G.C. Exh. 19)

Guzman testified that, after he collected all the completed COVID forms from employees, he placed them on the table and Mosslih put them in an envelope. (Tr. 513-514) Mosslih testified that Guzman handed him the completed COVID cards at about 6:50 a.m. and he placed them on the table. (Tr. 430)

Chafra testified that, a few minutes before 7 a.m., he went back outside and threw the second piece of paper with his name and number in the street. Zarnoch picked it up. Chafra reentered the building and proceeded to his workstation on the third floor. (Tr. 54-57, 82-86, 88-93, 106-109) (G.C. Exh. 19) Zarnoch testified that Chafra waived to him when he came outside and threw two papers (folded together) into the street. (G.C. Exh. 17-19) According to Zarnoch, both papers contained Chafra's name and number, but one had a scratch in the second digit while the other did not. Brown was standing next to Chafra when Chafra threw the papers in the street. Zarnoch then saw Chafra and Brown enter the building. Shortly thereafter, Zarnoch saw Brown come back out of the building with Mosslih. Zarnoch gave the papers to Ayala, who was sitting in his car. Ayala took pictures of both papers and those pictures are date/time stamped January 14 at 7:01 a.m. (G.C. Exh. 17-19) (Tr. 183-186, 188-194, 205, 253-255, 272-274, 284)

Like Zarnoch, Brown testified that Chafra threw papers in the street, but described the papers differently. Brown claimed that Chafra threw what appeared to be several 8"x11" pages (folded together) and quickly reentered the building. Brown testified that the papers were folded twice and looked about a quarter the size of an unfolded 8"x11" paper. According to Brown, he saw multiple pages flap in the air. Brown admitted that one of the union representatives picked

the papers up. (Tr. 313-315, 334-336, 339-341)

Brown testified that, after Chafra threw the papers in the street, he (Brown) walked into the building and told Guzman what he saw. Guzman told Mosslih what Brown said and Mosslih asked Brown if he could describe the employee who threw the papers. Brown said he could. Mosslih testified that Brown came inside and told him, "I seen one of your workers throw a bunch of papers in the street. And he said he seen guys from across the street come pick them up." (Tr. 376) According to Mosslih, he looked at the table and saw that the papers were disheveled, as if someone swiped the whole desk of all the paperwork. Mosslih did not know, at the time, whether any papers were missing. (Tr. 315-319, 367-380, 428-433)

Although Mosslih admitted that Brown told him he saw one of the "guys from across the street" come pick up the papers Chafra threw in the street, Mosslih denied he knew the person who retrieved the papers was with the Union. Mosslih was shown a copy of an affidavit he provided during the investigation in which he admitted he noticed an inflatable rat on a black pickup. In the same affidavit, Mosslih admitted that "the guy from the black pickup truck simultaneously picked up the papers dropped by the worker." Finally, Mosslih admitted at trial that he knew the rat was a union rat. Nevertheless, Mosslih persisted in denying he knew the papers were picked up by someone with the Union. Mosslih testified that "there's a million black pickups . . . in New York." (Tr. 315-319, 376-378, 433-438)

Mosslih approached Garcia and told him in English to come outside. (Tr. 133) According to Garcia, Mosslih appeared angry. They walked over to Brown and Mosslih asked Brown whether Garcia was the person who threw the papers. Brown said Garcia was not the person. Mosslih told Guzman to bring all the employees downstairs. (Tr. 134-135, 145-146) Guzman rounded up the employees and had them come downstairs. Brown testified that he looked at each employee as they walked out the door of the building and attempted to identify the person who threw the papers.⁸ (Tr. 330) According to Brown, Chafra was the last employee to come down and Brown identified him as the employee who threw the papers. (Tr. 318)

Chafra testified that, when he came downstairs, Mosslih was shouting to the employees, "who threw a paper to the Union?" (Tr. 57-61, 100-102) However, Garcia testified that Mosslih only asked Brown whether each employee was the person they were looking for and said nothing else. (Tr. 145-146) Ultimately, Brown identified Chafra as the person who threw the papers. Like Garcia, Brown testified that Mosslih did not say anything to the employees. (Tr. 319) Chafra claimed that Mosslih said to him, "you throw some paper to the Union." (Tr. 59) Mosslih testified that he told Guzman to tell the employees to go back to work and bring Chafra inside the office. (Tr. 57-61, 134-135, 145-146, 317-319, 330-332, 376-378, 495)

Chafra testified that, once the other employees were gone, Mosslih asked him angrily, "what paper did you give to the Union?" (Tr. 59) Chafra claimed he initially denied having

⁸ There was some confusion in the record as to whether this identification process occurred inside or outside the building. Brown testified that employees "came down came out the door right there, that's where I was able . . . to identify them." (Tr. 330) Brown also testified that he was "still doing stuff around the truck . . . So now they started to bring down people." (Tr. 318) Guzman testified that the employees came downstairs "in a line" and the driver was "[i]n front of the building is outside." (Tr. 509) Guzman then "put together all the people outside and circled so [Brown] could see who throw papers." (Tr. 509). Garcia also testified that Mosslih brought him outside to see Brown. (Tr. 133) In addition, Zarnoch testified that he saw Brown enter the building and then come back outside with Mosslih. (Tr. 205) Thus, I find that the identification process occurred outside.

thrown papers to the Union because he did not believe the papers with his name and phone number were the papers Mosslih was talking about. Rather, Chafla thought Mosslih was referring to a more "important paper." (Tr. 60) Chafla testified that Guzman said, "he's talking about a paper you throw to the Union." (Tr. 60) Chafla then admitted he put his name and number on a paper, but denied throwing anything else. Mosslih told Chafla he should go home and was not needed anymore. (Tr. 59-60)

Mosslih testified that he twice asked Chafla whether he took some papers off the table and threw them in the street, and both times Chafla denied it. Mosslih claimed he then directed Guzman to tell Chafla to tell the truth because somebody saw him. At this point, according to Mosslih, Chafla admitted "it was extra COVID papers that I had, and I threw away." (Tr. 381-382) Mosslih admitted he did not know why someone would take blank COVID forms and did not ask Chafla for an explanation. (Tr. 456-457) When Mosslih was questioned about whether he asked Chafla why he took COVID forms, Mosslih responded, "[h]e said they were just blank. He didn't say a reason. They were blank and he threw the . . . in the garbage. . . . Which made no sense to me." (Tr. 478)

Although Mosslih testified that Chafla admitted he threw some blank COVID forms away, Guzman testified that neither Chafla nor Mosslih mentioned the COVID forms. Guzman also testified that Mosslih did not ask Chafla which papers he took. (Tr. 513) According to Guzman, Mosslih asked Chafla three times if "he was the one throwing the papers outside." (Tr. 497) Guzman testified that Chafla denied doing so the first two times and admitted doing so the third time. Guzman further testified, in a halting manner and with significant difficulty, that Chafla admitted he obtained the papers he threw outside from the table. (Tr. 498-499, 503-504)

Mosslih discharged Chafla immediately after this conversation and, at trial, explained his decision for doing so as follows (Tr. 381):

I thought about it for a few minutes. I had to let him go. I had to terminate him because who knows what else he stole . . . in the past. People's lives would have been at danger for things he could have done in the past. If he would have told me right away the first time I asked him, I probably just would have wrote him up, either suspended him or warned him. But the reason that he lied to me and knowing him for so many years, the trust I had for him went out the window. There was no more trust. When it comes to demolition, you cannot have a guy on your team that you don't have any trust in because then other people could get hurt because maybe something that he would do. I don't know, but I wouldn't let that happen.

Mosslih denied the discharge concerned the Union. Rather, according Mosslih, it "had to do with someone stealing something off my desk and throwing it in the street." Mosslih claimed he could see there were some completed COVID forms missing from the table. (Tr. 400-401, 438-439) However, Guzman testified that, by the time this conversation occurred, Mosslih had already placed the completed COVID forms in an envelope. (Tr. 513-514) Although Mosslih testified that "no one should be touching anything on my desk" (Tr. 380), he later testified that the decision to discharge Chafla "wasn't the most about . . . stealing." (Tr. 455) Rather, according to Mosslih, "it was the most about lying. What else he lied to me in the past over 5 years? Maybe something he could have lied about that a worker could have been killed for him lying about something." (Tr. 455)

Mosslih testified that, at some point, he compared the completed COVID forms to the sign-in Foreman Sheet to determine which were missing. Mosslih admitted he did not ask the

employees to complete new COVID forms if their original forms were missing. (Tr. 443-446).

Mosslih drafted an "Employee Disciplinary Action Form" which indicated that Chafla was "fired" because he "stole paperwork off supervisors desk and threw it in garbage on purpose." (Tr. 390) (G.C. Exh. 35) (R. Exh. 5) Mosslih claimed that Chafla refused to sign the document. However, Guzman testified that Mosslih did not ask him to translate the disciplinary form for Chafla or ask Chafla to sign it. (Tr. 499) Chafla denied he was presented with this disciplinary form when he was discharged. (Tr. 64)

Mosslih admitted he did not know why someone would steal COVID forms. Mosslih testified that the last thing he wanted to do was fire Chafla and that he was sick about it for months. (Tr. 456-458) According to Mosslih, Chafla's conduct upset him "[b]ecause he was my longest worker, and I was shocked. Like, my heart was broken that it was him that would do that to me. I would have never thought in a million years that he would do something like that." (Tr. 380) Mosslih testified, "how could I have trust for him anymore[?] He stabbed me in the back." (Tr. 455)

On January 14, Mosslih completed a Raken Report which included the following under General Notes (R. Exh. 3):

Local 79 starting trouble this morning police were called
Dob INSPECTOR hayes was here for a false complaint all books in order no violations
He said the bridge need to be adjusted

Mosslih's January 14 Raken Report also stated as follows regarding incidents which occurred that day (R. Exh. 3):

Fausto Chafla stole papers of my desk and threw them away
Local 79 started trouble this morning police were called

Mosslih testified that he suspected the Union of calling the police and the DOB inspector on January 14. (Tr. 473-475)

The General Counsel subpoenaed the completed COVID forms for January 14, but the Respondent did not produce the documents. Respondent's counsel explained that the completed COVID forms were collected from numerous sites and kept in hundreds of boxes without labeling the boxes by date or jobsite. Respondent's counsel represented that the Respondent looked through the boxes for 2 days but could not find the completed COVID forms for January 14. Thus, the Respondent gave up and made no additional efforts to find the documents. (Tr. 446-447)

CREDIBILITY

In this section, I make certain observations and findings regarding credibility.

Mosslih was not a credible witness and I find that he tailored his testimony to diminish the involvement of the Union in relevant events. In an affidavit provided during the investigation, Mosslih stated that he noticed an inflated union rat in the back of a black truck and "the guy from the black pick truck simultaneously picked up the papers dropped by the worker." (Tr. 435) Nevertheless, at trial, Mosslih repeatedly denied he knew that the individual who picked up the papers was associated with the Union. Further, in an affidavit, Mosslih stated

that, "When I arrived, I did not approach or speak to any of the Union representatives, nor did they speak to me. I also did not observe any employee outside the building or in the work lane when I arrived. Upon my arrival at the building [I] immediately entered the building." (Tr. 435) However, a video reflects that Mosslih had a 4-minute altercation with the Union upon his arrival at the Site. (G.C. Exh. 13) The obvious conflicts between Mosslih's testimony at trial and his own affidavit reflects poorly on his general credibility.

Mosslih's lack of credibility was also demonstrated by Guzman's failure to corroborate him in certain significant respects. It is particularly telling of Mosslih's credibility that he claimed Chafila admitted he threw out extra COVID forms, while Guzman testified that neither Mosslih nor Chafila mentioned the COVID forms. Guzman also contradicted Mosslih's testimony that the completed COVID forms were on the desk and some were missing. According to Guzman, he placed the completed COVID forms on the table and Mosslih put them into an envelope (which is a common practice). In addition, Guzman contradicted Mosslih's testimony that Chafila was presented with or refused to sign a disciplinary form. According to Guzman, Mosslih did not ask him to present Chafila with such a disciplinary form and Chafila did not refuse to sign one.

Mosslih's testimony that he noticed some completed COVID forms were missing from the table was particularly unworthy of belief. As noted above, Guzman testified that, on January 14, he placed the completed COVID forms on the table and Mosslih placed the forms in an envelope. Further, the Respondent admittedly failed to produce the completed COVID forms in response to a General Counsel subpoena without offering a valid explanation. Respondent's counsel represented that the Respondent spent 2 days looking for the documents and could not find them among other such forms which were stored in unlabeled boxes. However, the Union filed the charge in this case on January 20 and, according to Mosslih, the COVID forms were central to the events which led to Chafila's discharge. Mosslih also understood that the Respondent was required by law to keep the completed forms, which were subject to DOB inspection. It makes little sense that the Respondent would bury such important documents in a mass of unlabeled boxes. Moreover, the Respondent was not at liberty to forgo the search for subpoenaed records after a couple of days. The Respondent's failure to adequately retain and search for the subpoenaed records warrants an inference that such records would not have corroborated Mosslih's testimony. For this reason and because I credit Guzman (the Respondent's witness), I reject Mosslih's testimony that any completed COVID forms were missing. See e.g., *Shamrock Foods Co.*, 366 NLRB No. 117, ALJ fn. 29 (2018).

I credit Zarnoch to the extent he testified that Chafila folded two pieces of paper with his name and number on them and threw those papers in the street after exiting the building.⁹ Brown testified that Chafila threw in the street what appeared to be several 8"x11" pieces of paper folded twice into quarters. However, Zarnoch and Chafila testified to the contrary. Further, Ayala testified that Zarnoch handed him two pieces of paper with Chafila's name and number on them. More importantly, Ayala took pictures of both papers on January 14 at 7:01 a.m. (G.C. Exh. 17-19) These pictures provide significant corroborating evidence that the papers were accurately described by the General Counsel's witness.

I credit Garcia's testimony regarding events which occurred when Guzman called

⁹ I do not credit Chafila to the extent he testified that he threw one paper in the street before he entered the building and another paper in the street after he exited the building. I think it likely that he realized he had both pieces of paper in his bag after he spoke to Garcia and went back outside. Although it is possible that Chafila obtained the paper from the table, nobody saw him do so (even though Mosslih, Guzman, and Garcia were nearby). In any event, I do not find this factual issue significant to my decision.

employees downstairs to be identified by Brown as the employee who threw papers in the street. Garcia did not corroborate Chafra's testimony that Mosslih asked employees, while they were gathered downstairs, "who threw a paper to the Union?" Garcia is not a party and has nothing to gain from this proceeding. Garcia appeared forthcoming in his demeanor and willing to answer questions honestly in response to questioning by counsel for either party. I found Garcia particularly credible and credit his testimony in its entirety. I also find it significant that neither Zarnoch nor Ayala were asked to testify regarding the incident, which occurred outside. Chafra testified that Mosslih was "shouting" when he asked employees, "Who threw a paper to the Union?" Further, Zarnoch testified that he was still present when Mosslih exited the building with Brown. Accordingly, Zarnoch should have been able to hear what Mosslih was shouting to employees. Since three General Counsel witnesses either contradicted or failed to corroborate Chafra's testimony, I do not find that Mosslih asked employees, "who threw the paper to the Union?"

I credit Guzman to the extent he testified that Mosslih asked Chafra three times whether "he was the one throwing the papers outside." (Tr. 497) Guzman was asked a non-leading question and answered spontaneously and confidently. I also credit Guzman's testimony that Chafra denied throwing papers outside the first two times he was asked and admitted throwing papers outside the third time he was asked. I do not credit Chafra to the extent he testified that Mosslih specifically accused Chafra of throwing papers "to the Union" or asked Chafra "what paper did you give to the Union?" Likewise, I do not credit Chafra to the extent he testified that Guzman said Mosslih was "talking about a paper you throw to the Union." As noted above, Garcia credibly denied Chafra's testimony that Mosslih questioned all the employees in a similar fashion. Thus, Chafra seemed inclined to exaggerate his testimony by adding references to the Union.

I do not find that Mosslih, through Guzman, asked Chafra whether he took papers off the table or that Chafra admitted he had done so. As noted above, Guzman credibly testified that Mosslih asked Chafra "if he was the one who was throwing the papers outside." This was generally consistent with Chafra's testimony (except Chafra claimed that Mosslih asked whether he threw papers "to the Union"). Guzman's subsequent testimony was far more halting and ambiguous when he was asked by Respondent's counsel, "Did [Mosslih] ever ask where [Chafra] got the papers?" Guzman did not clearly or confidently testify that Chafra admitted he took papers off the table. As for Mosslih, as noted above, he was not a credible witness. Guzman expressly contradicted Mosslih's testimony that either Mosslih or Chafra mentioned the COVID forms. Thus, I do not credit Mosslih to the extent he testified that Chafra said "it was extra COVID papers that I had, and I threw away." (Tr. 381-382) However, even if Mosslih were credited, he did not testify that Chafra admitted he took the forms from the table. Mosslih merely testified that Chafra said he "had" the COVID papers, without identifying the source.

I credit Ayala, Zarnoch, and Chafra in their testimony that, when Mosslih arrived at the Site, he (Mosslih) told Ayala not to talk to employees. In my opinion, all three General Counsel witnesses were more credible than Mosslih. Indeed, as noted above, Mosslih denied in his affidavit that he spoke to Union representatives upon his arrival at the building even though a video shows him having a lengthy argument with them. Accordingly, Mosslih's testimony regarding this argument is particularly unreliable. Although Guzman testified that he never heard Mosslih tell a union representative not to speak to employees, it is not clear that Guzman was in a position to hear what Mosslih said to Ayala. Further, Guzman did not offer any testimony regarding the way the argument started. Accordingly, the most credible evidence is the testimony of the

General Counsel's witnesses.

Finally, I credit Chafra's testimony that he understood Mosslih's directive to Ayala not to speak with employees even though Mosslih made the comment in English. Chafra credibly testified that he speaks a little English. Further, Chafra was able to testify in English regarding Mosslih's comment.

ANALYSIS

Supervisor Status of Mosslih and Agency Status of Guzman

The General Counsel contends that, at all relevant times, Mosslih has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and Guzman has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

Although the Respondent refused to admit that Mosslih was a supervisor, the Respondent presented uncontested evidence that Mosslih has had exclusive authority to hire, fire, and discipline his employees. Accordingly, I find that, at all relevant times, Mosslih was a supervisor within the meaning of Section 2(11) of the Act.

I also find that, at all relevant times, Guzman was an agent of the Respondent within the meaning of Section 2(13) of the Act. Mosslih does not speak Spanish and admitted that he cannot communicate with his Spanish speaking employees without Guzman acting as an interpreter. According to Mosslih, "[Guzman] runs the job. I tell him what has to be done, what I need done, and he translates it to all the men." (Tr. 371) Guzman's title is foreman and he does not perform any rank-and-file demolition work. Further, Guzman worked closely with Mosslih in conducting the COVID screening process before employees entered the building each day. Under the circumstances, I find that employees would reasonably believe Guzman spoke for management as a proxy for Mosslih and was an agent of the Respondent within the meaning of Section 2(13) of the Act. See *RHCG Safety Corp.*, 365 NLRB No. 88 (2017).

8(a)(1) Allegations

Mosslih Directive to Ayala not to Speak to Employees

The General Counsel contends that, on January 14, the Respondent, by Mosslih, violated Section 8(a)(1) of the Act by instructing Union organizer Ayala not to speak to employees. As discussed above in the credibility section of this decision, I credit the testimony of Ayala, Zarnoch, and Chafra that, when Mosslih arrived at the Site, he told Ayala not to talk to his people.

In support of this allegation, the General Counsel cites certain cases for the proposition that Mosslih's conduct interfered with employees' Section 7 rights. *Corporate Interiors, Inc.*, 340 NLRB 732 (2003); *PSK Supermarkets, Inc.*, 349 NLRB 34 (2007); *Winkle Bus Co.*, 347 NLRB 1203 (2003); *Grass Valley Grocery Outlet*, 338 NLRB 877 (2003). These cases and the cases cited therein largely involve violations where an employer threatened a union representative in front of employees or engaged in surveillance of employees' union activity. See e.g., *Winkler Bus Co.*, 347 NLRB at 1203-1204, 1217-1218 (employer threatened to call police while union representatives were handbilling on public property); *Corporate Interiors, Inc.*, 340 NLRB at 732-733 (owner told manager to tell union representative "to get the fuck off his job or he was going to blow his head off"); *Grass Valley Grocery Outlet*, 338 NLRB at fn. 2 (manager

approached union representative while speaking to employees and said he was there to observe the meeting); *Unbelievable, Inc.*, 323 NLRB 815, 816 (1997) (employee heard supervisor threat to discharge any employee seen wearing a union button).

5 The Board's decision in *Wild Oats Community Markets*, 336 NLRB 179 (2001) is also helpful and perhaps more analogous in evaluating the instant case. In *Wild Oats*, the employer (a grocery store located in a strip mall) violated Section 8(a)(1) by calling the mall manager and impliedly requesting that some action be taken to remove picketing nonemployee union representatives from mall property. The employer did not
10 have an interest in the property where the union representatives and an employee were picketing and handbilling. 336 NLRB at 181-182. In finding a violation, the Board noted that "[i]t is beyond cavil that had the Respondent directly ordered the union representatives to cease picketing and vacate the premises . . . the [employer] would have engaged in unlawful interference with employee Section 7 rights." *Id.* at 181.
15 There is little substantive difference between an employer's direction to a union representative to leave public property and the Respondent's direction to a union representative not to speak with employees on public property. Both statements seek to accomplish the same goal of denying employees the right to hear what an organizer has to say about organizing and union representation (which is what Chafra and Ayala were
20 discussing) on nonworking time and in nonworking areas.

Of note, the *Wild Oats* Board explained why the employer's conduct was not protected by Section 8(c) of the Act:

25 [T]he legislative history of the Taft-Hartley amendments indicates that Section 8(c) was enacted for the principal purpose of protecting employers' rights to express their views or opinions regarding unions and union organization to their employees. See 1 Legis. His-tory 429, 959 (LMRA 1947); *NLRB v. Overnite Transportation Co.*, 938 F.2d 815, 819 (7th Cir. 1991), *enfg.* 296 NLRB 669
30 (1989). The [employer] here was neither expressing views or opinions, nor directing its message to employees; rather, the [employer] conveyed to the property manager an implicit request that the manager engage in action that would interfere with employee rights guaranteed by the Act.

35 Like the employer in *Wild Oats*, Mosslih went beyond simply expressing a view or opinion in directing a union representative not to speak to employees on public property before work. Mosslih's statement was unqualified and made in front of employees. Mosslih's comment also initiated a lengthy argument in which Mosslih walked toward Ayala while shouting in an aggressive manner. Mosslih claimed that Ayala was standing
40 in a lane reserved by permit for Respondent's trucks, but the permits were not valid until January 22 and Ayala was not obstructing any vehicle from parking.

 Since we know from *Wild Oats* that the Board would find a violation if "the Respondent directly ordered the union representatives to cease picketing and vacate the
45 premises," it logically follows that the Respondent violated the Act by directly ordering a union representative to stop speaking with employees. Further, an employee (e.g., Chafra) witnessing this incident might reasonably believe that he was forbidden from speaking to union representatives and could be disciplined for doing so. Indeed, as discussed below, less than hour later, the Respondent unlawfully interrogated Chafra
50 about throwing paper into the street for a union representative to pick up and discharged Chafra for doing so. Given the context and the totality of the circumstances, Mosslih's

direction to Ayala not to speak to employees violated Section 8(a)(1) of the Act.

Interrogations

5 The General Counsel contends that, on January 14, Mosslih unlawfully interrogated employees by (1) asking employees who were brought before Brown, "Who threw a paper to the Union?", and (2) after Brown identified Chafla as the person who threw the papers, asking Chafla "what paper did you give to the Union?" (Tr. 58-59)

10 As discussed in the credibility section, I do not credit Chafla to the extent he claimed that Mosslih asked employees gathered in front of Brown, "who threw a paper to the Union?" Garcia denied that Mosslih made such comments and I credit Garcia. Accordingly, I do not find that the Respondent, by Mosslih, violated Section 8(a)(1) of the Act by asking employees, "Who threw a paper to the Union?"

15 Likewise, I do not credit Chafla to the extent he testified that Mosslih asked him, "what paper did you give the Union?" Rather, I credit Guzman to the extent he testified that Mosslih asked Chafla, through Guzman, whether "he was the one who was throwing the papers outside?" Nevertheless, Mosslih's questioning of Chafla in this manner requires a more detailed analysis as to its legality.

20 The Board will consider the totality of the circumstances in determining whether an employer's questioning of an employee would reasonably tend to restrain, coerce, or interfere with the employee's rights under the Act. *Rossmore House*, 269 NLRB 1176 (1984). In *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1182 (2011), the Board described factors relevant the *Rossmore House* analysis as follows:

30 This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, 269 NLRB at 1178 fn. 20.

45 An employer's questioning of an employee may be unlawful even if it does not expressly reference a union or union activity. See e.g., *Gloria Oil and Gas Co.*, 337 NLRB 1120, 1122-1123 (2002).

50 Here, Mosslih knew an employee threw certain papers in the street and an individual engaged in the Union job action picked them up. Therefore, by asking Chafla if he was the one

throwing the papers outside, Mosslih effectively asked Chafla to disclose whether he was communicating or dealing with the Union. Mosslih could have simply asked Chafla whether he took any documents off the table and, if so, what those documents were. However, the credible evidence indicates that Mosslih did not ask Chafla those questions. Further, Mosslih had no legitimate business reason to inquire about papers Chafla may have thrown outside unless the type and source of those papers were previously established. Accordingly, I find that the nature and scope of the questioning favors the finding of a violation.

Additional factors weigh in favor of a finding that Mosslih unlawfully interrogated Chafla. Mosslih was the individual in charge of the Site with exclusive authority to hire, fire, and discipline employees. Shortly before the interrogation, Mosslih told Ayala (in front of Chafla) that he should not speak to the employees and this comment initiated a lengthy argument between Mosslih and the Union. Chafla did not immediately reveal that he threw papers into the street to be picked up by the Union, which suggests he felt intimidated by the questioning. Indeed, Mosslih terminated Chafla immediately after he (Chafla) answered the questions. In this context, Mosslih's questioning of Chafla would present a powerful message to employees that giving information to the Union or otherwise dealing with the Union was not allowed. Accordingly, I find that the Respondent, by Mosslih, violated Section 8(a)(1) of the Act by interrogating Chafla regarding his union activity.

8(a)(3) Allegation

The General Counsel contends that, on January 14, the Respondent discharged Chafla because of his union activity.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549, fn. 6 (2008) citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996) affd. 127 F.3d 34 (5th Cir. 1997). The elements of the General Counsel's initial burden are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Fremont-Ridout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The General Counsel's prima facie case may be established by direct and/or circumstantial evidence, including evidence that the employer's stated reasons for discharging an employee were pretextual. *Abbey's Transportation Services, Inc.*, 284 NLRB 698, 701 (1987). Evidence of pretext may include the timing of a discharge, shifting or implausible explanations for the discharge, and a failure to investigate or allow the employee to respond to allegations of misconduct. *Shamrock Foods Co.*, 366 NLRB No. 117 (2018); *Lucky Cab Co.*, 360 NLRB 271, 274-275 (2014); *Grant Prideco, L.P.*, 337 NLRB 99 (2001).

The General Counsel's Prima Facie Case

Here, the credible evidence established that Chafla engaged in union activity by passing papers with his name and phone number to the Union. Although Mosslih did not necessarily know what information the papers contained, he was admittedly aware that Chafla threw papers of some kind into the street and that a Union representative pick them up.¹⁰ Mosslih

¹⁰ As discussed in the credibility section, I do not credit Mosslih to the extent he testified that

demonstrated animus toward such activity by unlawfully directing Ayala not to speak with employees and unlawfully interrogating Chafla about throwing the papers outside. These facts, standing alone, would establish the General Counsel's prima facie case, but they are supported by additional circumstantial evidence discussed below.

The totality of the circumstantial evidence strongly suggests that the Respondent's stated reasons for discharging Chafla were pretextual. Such evidence includes Mosslih's shifting reasons for the termination. See e.g., *Shamrock Foods Co.*, 366 NLRB No. 117 (2018) (shifting reasons for discharge suggest true reason is union activity). Mosslih testified that he primarily terminated Chafla for not immediately admitting he took some papers and threw them away. However, the disciplinary action form that Mosslih completed makes no mention of Chafla lying. Rather, the disciplinary form states that Chafla "stole paperwork off supervisors desk and threw it in garbage on purpose." Likewise, in describing the discharge in his January 14 Raken Report, Mosslih merely stated, "Fausto Chafla stole papers of my desk and threw them away[.] Local 79 started trouble this morning police were called[.]" The Raken Report makes no mention of Chafla lying.

An employer may offer one contemporaneous reason at the time of discharge and shift to a different reason at trial because the original explanation is flimsy and more obviously pretextual. Here, at the time of discharge, Mosslih stated twice in writing that he discharged Chafla for taking papers from the desk. However, the credible evidence established that Mosslih did not ask Chafla whether he took papers from the table, which papers they were, or why. Mosslih merely asked Chafla whether he threw some papers outside. Mosslih kept hundreds of blank forms on his desk and even he conceded that throwing papers outside would not be a dischargeable offense. Accordingly, Mosslih emphasized at trial that it was Chafla's failure to admit his conduct which was the actual reason for termination. However, as noted above, that is not what Mosslih stated twice in writing. Mosslih did note in the January 14 Raken Report that the Union was "starting trouble." Further, earlier that day, Mosslih angrily and unlawfully directed Ayala (who was speaking to Chafla) not to speak to employees. Not surprisingly, Mosslih's unlawful questioning of Chafla focused on whether he threw papers outside (knowing that the Union picked them up). This sequence of events suggests that the Respondent's shifting reasons for discharging Chafla were pretextual and the actual reason was that Chafla passed papers to the Union.

It is telling of the Respondent's motive that Mosslih believed Chafla "stabbed me in the back." Mosslih testified that Chafla's conduct upset him "[b]ecause he was my longest worker, and I was shocked. Like, my heart was broken that it was him that would do that to me. I would have never thought in a million years that he would do something like that." Mosslih's belief that Chafla acted so treasonously is at odds with Mosslih's testimony that he would not have discharged Chafla for stealing papers or even that Chafla "lied" about it. After all, Chafla did ultimately admit he threw papers outside. Given Mosslih's angry interaction with the Union after directing a Union representative not to talk to employees, it seems more likely that Mosslih felt so profoundly betrayed because he thought Chafla was dealing with the Union.

The rushed and abrupt manner in which Mosslih discharged Chafla, a highly valued employee whom Mosslih thought of as family, is additional evidence of pretext. *David Saxe*

Chafla admitted he threw blank COVID papers in the street. However, even if Mosslih incorrectly believed as much, it would not be exculpatory. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) (an employer's misperception of the protected nature of an employee's activity is not a defense). In fact, I do not believe Chafla's conduct would be rendered unprotected if he did pass blank COVID forms to the Union.

Productions, LLC, 370 NLRB No. 103 (2021) (the strong inference that Respondent acted out of antiunion motivation is further validated by the abrupt and slap-dash manner in which the discharges were carried out). Mosslih did not show Chafla the disciplinary form he prepared or give Chafla an opportunity to respond to it. Mosslih did not ask Chafla what papers he took off the table and Chafla did not admit he took any papers. Nevertheless, Mosslih abruptly discharged his beloved, reliable, long-term employee upon this unsubstantiated claim.

Finally, even if Mosslih did discharge Chafla for lying about throwing papers in the street for the Union to pick up, it would do nothing to undermine the General Counsel's prima facie case. As noted above, the Board has long held that an employee's attempt to conceal union activity in response to employer questioning weighs in favor of a finding that the interrogation is unlawful. *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1182 (2011). It stands to reason that an employee has a Section 7 right to refuse to reveal information which would unnecessarily disclose his union activity. The legal framework would make little sense if an employer could not lawfully interrogate an employee regarding that employee's union activity, but lawfully discharge the employee for refusing to reveal such activity. Thus, Chafla had a legal right to refrain from immediately disclosing he threw papers in the street for the Union to retrieve. Accordingly, even if Mosslih were credited in this regard and his reason for discharging Chafla were not pretextual, the Respondent effectively admits that it discharged Chafla because he engaged in activity protected by Section 7 of the Act.

The Respondent has no Mixed-Motive *Wright Line* Defense

Once the General Counsel establishes a prima facie case that a significant reason for the Respondent's discharge decision was an employee's union activity, the Respondent may still establish an affirmative defense that it would have taken the same action in the absence of that activity. *Wright Line*, 251 NLRB 1083 (1980). However, such a "mixed-motive" *Wright Line* defense is not available where the Respondent fails to prove that its stated reason for discharging the alleged discriminatee is not entirely pretextual or fails to present any legitimate contributory motive for the termination.

Here, the credible evidence indicates that the Respondent discharged Chafla because he passed papers to the Union and not because Chafla failed to immediately admit he had done so. However, as noted above, even if the Respondent's explanation were not pretextual, Chafla had a Section 7 right to refuse to unnecessarily disclose information that would have revealed his union activity. Thus, the Respondent did not establish any legitimate reason for terminating Chafla and this is not a "mixed-motive" case. Absent a legitimate motive, the Respondent can establish no *Wright Line* defense. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Chafla because of his protected union activity.

CONCLUSIONS OF LAW

1. The Respondent, Alba Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all relevant times, Richard Mosslih has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

3. At all relevant times, Murcio Guzman has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

4. The Respondent, on January 14, by Mosslih, violated Section 8(a)(1) of the Act by:

(a) Directing a union representative not to speak with its employees.

5 (b) Interrogating employees regarding their union activity.

5. The Respondent, on January 14, violated Section 8(a)(3) and (1) of the Act by discharging Fausto Chafila because of his union activity.

10 6. The unfair labor practices committed by the Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

15 Having found that the Respondent, Alba Services, Inc., engaged in unfair labor practices, I shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

20 The Respondent, having unlawfully discharged Fausto Chafila because of his union activity, must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he enjoyed.

25 The Respondent shall make Chafila whole for any loss of earnings and other benefits resulting from his discriminatory discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Chafila for his search-for-work and interim
30 employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Chafila for
35 the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the
40 report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director of Region 2 a copy of Chafila's W-2 form reflecting the backpay award.

45 In addition, the Respondent will be required to remove from its files any reference to the unlawful discharge of Chafila. The Respondent shall then notify Chafila in writing that his unlawful discharge will not be used against him in any way.

50 The Respondent will be ordered to post the notice attached hereto as "Appendix."

On these findings of fact and conclusions of law, and on the entire record, I issue the

following recommended¹¹

ORDER

The Respondent, Alba Services, Inc., New York, New York, its officers, agents,
successors, and assigns, shall

1. Cease and desist from

(a) Directing union representatives not to speak with its employees.

(b) Interrogating employees regarding their union activity.

(c) Discharging employees because of their union activity.

(d) In any like or related manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Fausto Chafla reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Chafla whole for any loss of earnings and other benefits resulting from the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Compensate Chafla for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Chafla, and within 3 days thereafter, notify Chafla in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 21 days of the date the amount of backpay is fixed by agreement, or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 2 a copy of Chafla's corresponding W-2 form reflecting the backpay award.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such

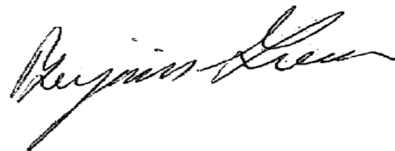
¹¹ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5 (g) Within 14 days after service by the Region, post at its New York, New York
facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms
provided by the Regional Director for Region 2, after being signed by the Respondent's
authorized representative, shall be posted by the Respondent and maintained for 60
consecutive days in conspicuous places, including all places where notices to employees are
10 customarily posted. In addition to physical posting of paper notices, notices shall be distributed
electronically, such as by email, posting on an intranet or an internet site, and/or other electronic
means, if the Respondent customarily communicates with its employees by such means.
Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,
defaced, or covered by any other material. In the event that, during the pendency of these
15 proceedings, the Respondent has gone out of business or closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice
to all current employees and former employees employed by the Respondent at any time since
January 14, 2021.

20 (h) Within 21 days after service by the Region, file with the Regional Director for
Region 2 a sworn certification of a responsible official on a form provided by the Region
attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C., January 28, 2022.



25

Benjamin W. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees for engaging union activity.

WE WILL NOT direct union representatives not to speak to employees.

WE WILL NOT interrogate employees regarding their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Fausto Chafra full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Fausto Chafra whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest and **WE WILL** also make Fausto Chafra whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Chafra for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 2 a copy of Fausto Chafra's corresponding W-2 form reflecting the backpay award.

WE WILL remove from our files any reference to the unlawful discharges of Chafra, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

Alba Services, Inc.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website:

www.nlrb.gov

26 Federal Plaza #364, New York, NY 11278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-271714 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (212) 264-0300.